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U.S. DISTRICT COURT
N.D. OF ALABAMA

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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CARLA MANCIL, as mother and next friend of JOSHUA MANCIL, a minor

Plaintiff,

v.

NINTENDO OF AMERICA INC.

Defendant.

CV-07-P-0922-M

NOTICE OF REMOVAL

Defendant, Nintendo of America Inc. ("Nintendo"), pursuant to 28 U.S.C. §§ 1332 and 1441, files this Notice of Removal of the foregoing cause from the Circuit Court of Etowah County, Alabama, wherein it is pending as CV-07-70, to the United States District Court for the Northern District of Alabama, Middle Division. As grounds for this removal, Nintendo shows the Court as follows:

Mancil v. Nintendo of America, Inc Doc. 1

1. Plaintiff, Carla Mancil, as mother and next friend of Joshua Mancil, a minor, brought this action in the Circuit Court of Etowah County, Alabama, on or about January 29, 2007. Nintendo was served with the summons and complaint by certified mail on April 16, 2007. This Notice of Removal, therefore, is timely filed under 28 U.S.C. § 1446(b).

PARTIES

2. Plaintiff is now, was at the time of the filing of the Complaint and at all times intervening, a citizen of Alabama. Complaint, ¶ 3.

3. Nintendo is now, was at the time of the filing of the Complaint and at all times intervening, a Washington corporation with its principal place of business in Washington state.

JURISDICTION

4. This Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1332 as there is complete diversity of citizenship between Plaintiff and Nintendo, and the citizenship of any Fictitious Defendants is disregarded for removal purposes.

5. The amount in controversy exceeds $75,000, exclusive of interest and costs, because Plaintiff seeks an unspecified and unlimited amount of compensatory and punitive damages under multiple counts. *See Bell v. Preferred Life Assurance Soc. of Montgomery, Ala.*, 320 U.S. 238, 240 (1943) (holding that a potential award of punitive damages against a defendant is included in determining the amount in controversy if such punitive damages are recoverable under governing law); *Holley Equip. Co. v. Credit Alliance Corp.*, 821 F.2d 1531, 1535 (11th Cir. 1987) (same). Where, as in this case, a complaint does not demand a specific amount of damages, the removing defendant must demonstrate that the amount in controversy satisfies the jurisdictional requirement by only a preponderance of the evidence. *Williams v. Best Buy, Inc.*, 296 F.3d 1316, 1319 (11th Cir. 2001); *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996), *overruled on other grounds by Office Depot v. Cohen*, 204 F.3d 1069 (11th Cir. 2000).

6. Plaintiff alleges that her son, Joshua Mancil, experienced a seizure while playing a video game designed, manufactured and sold by Nintendo. Complaint, ¶¶ 8, 12. The Complaint seeks recovery under multiple claims, including for negligence, breach of express and implied warranty, claims under the Alabama Extended Manufacturers' Liability Doctrine, failure to warn and wantonness. As part of the compensatory damages sought, Plaintiff seeks recovery for alleged mental anguish. Complaint, ¶ 13. Plaintiff also seeks punitive damages. Complaint, ¶ 43.

7. Although Nintendo denies that Plaintiff is entitled to recover any compensatory or punitive damages, Plaintiff's allegations put the requisite amount in controversy because mental anguish and punitive damage awards in cases involving claims against product manufacturers routinely exceed the jurisdictional minimum under Alabama law. *See, e.g.*, *General Motors Corp. v. Jernigan*, 883 So. 2d 646 (Ala. 2003) (jury verdict of $22 million in compensatory damages and $100 million in punitive damages against product manufacturer); *Hobart Corp. v. Scoggins*, 776 So. 2d 56 (Ala. 2000) (jury verdict of $510,000 in compensatory damages and $10 million in punitive damages against product manufacturer); *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d 505 (Ala. 2000) (affirming $375,000 verdict, a substantial portion of which was for mental anguish, against product manufacturer).

8. Moreover, "[w]hen the complaint does not claim a specific amount of damages, removal from state court is proper if it is facially apparent from the Complaint that the amount in controversy exceeds the jurisdictional requirement." *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1319 (11th Cir. 2001). The face of the Complaint makes it plain that this case involves a controversy whose value for removal purposes is greater than $75,000 by alleging that Plaintiff's son has suffered "severe permanent disabling injuries now and forever into the future that will affect him in all activities of daily living," Complaint, ¶ 32, and "has been caused to sustain severe injury, has suffered pain, suffering, mental anguish and distress and loss, and has otherwise been caused to incur medical bills." Complaint, ¶ 13. These allegations, especially when combined with Plaintiff's claim for punitive damages, clearly demonstrate the requisite amount in controversy. Further, the Complaint contains no disclaimer that Plaintiff seeks less than $75,000 exclusive of interests and costs.

9. A copy of this Notice of Removal has been served on Plaintiff and filed with the

Clerk of the Circuit Court of Etowah County, Alabama, as required by 28 U.S.C. § 1446(d).

10. A copy of all process, pleadings, and orders served upon the Defendant in this case are attached hereto as Exhibit A, pursuant to 28 U.S.C. § 1446(a).

11. All properly joined and served defendants consent to and join in this Notice of Removal.

WHEREFORE, Defendant Nintendo of America Inc. prays that this Court will consider this Notice conditioned as provided by law governing the removal of cases to this Court; that this Court will make the proper orders to effect the removal of this cause from said Circuit Court of Etowah County, Alabama, to this Court; and that this Court will make such other orders as may be appropriate to effect the preparation and filing of a true record in this cause of all proceedings that may have been had in said Circuit Court.

One of the Attorneys for Nintendo of America Inc.

OF COUNSEL:
J. Banks Sewell, III (SEW003)
Gray M. Borden (BOR015)
LIGHTFOOT, FRANKLIN & WHITE, L.L.C.
The Clark Building
400 North 20th Street
Birmingham, Alabama 35203-3200
(205) 581-0700
(205) 581-0799 (fax)

CERTIFICATE OF SERVICE

This is to certify that on this 16th day of May, 2007, a true and correct copy of the foregoing was served on counsel of record by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to

David F. Miceli
Simmons Cooper LLC
119 Maple Street, Ste 201
Carrollton, GA 30117

____
Of Counsel

IN THE CIRCUIT COURT OF ETOWAH COUNTY
STATE OF ALABAMA

CARLA MANCIL, as mother and	*	
And next friend of JOSHUA MANCIL,	*	
A minor	*	
	*	CASE NO. CV07-70 WHM
v.	*	
	*	
NINTENDO OF AMERICA, INC.,	*	

SUMMONS

This service by certified mail of this summons is initiated upon the written request of Plaintiffs' attorney pursuant to the Alabama Rules of Civil Procedure.

NOTICE TO: **Nintendo of America Inc**
4820 150th Avenue NE
Remond, WA 98052

[Stamp: FILED JAN 29 2007 BILLY YATES CLERK]

The Complaint which is attached to this summons is important and you must take immediate action to protect your rights. You are required to mail or hand deliver a copy of a written Answer, either admitting or denying each allegation in the Complaint to:

DAVID F. MICELI
SIMMONSCOOPER LLC
119 Maple Street Suite 201
Carrollton, Georgia 30117

the attorney for the Plaintiffs. THIS ANSWER MUST BE MAILED OR DELIVERED WITHIN THIRTY (30) DAYS FROM THE DATE OF DELIVERY OF THIS SUMMONS AND COMPLAINT AS EVIDENCED BY THE RETURN RECEIPT, OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT. You must also file the original of your Answer with the Clerk of this Court within a reasonable time afterward.

Billy Yates
Circuit Clerk

DATED: 2-21-07

EXHIBIT A

IN THE CIRCUIT COURT OF ETOWAH COUNTY
ETOWAH COUNTY, ALABAMA

CARLA MANCIL, as mother and and next friend of JOSHUA MANCIL, a minor,

Plaintiffs,

-vs-

NINTENDO OF AMERICA, Inc. a FOREIGN CORPORATION, Fictitious Defendants A-F, being that Person, Firm or Corportation that manu-Factured, sold, programmed, tested or Distributed the video game in question,

Defendant.

Case No.: CV-07-070-WAM

JURY TRIAL DEMANDED

COMPLAINT

COMES NOW, Plaintiff, Carla Mancil, as mother and next friend of Joshua Mancil, a minor, and for their action against the named Defendant and all fictitious Defendants, allege as follows:

NATURE OF ACTION

1. This is a claim alleging negligence, breach of warranty, and products liability under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD), for the sale, design, distribution, and placing into the stream of commerce, and thereby warranting, a video game titled Zelda II: The Adventures of Link.

2. Plaintiff, Carla Mancil, is an adult resident of Etowah County, Alabama, and is the mother and next friend of her minor child, Joshua Mancil. Plaintiff Carla Mancil brings this action in her representative capacity as mother and next friend of Joshua Mancil.

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3. At all times material to this Complaint, Plaintiff Carla Mancil was an adult resident of Etowah County, Alabama, and the injury alleged herein was suffered in Etowah County, Alabama.

4. Jurisdiction and venue are proper in this Court.

5. Upon information and belief, Defendant Nintendo of America, Inc., ("NOA"), is a foreign corporation doing business in Alabama and within the jurisdiction of this Court. NOA has its principal place of business in Redmond, Washington.

6. Fictitious Defendants A-F are/is that person , firm or corporation that manufactured, sold, programmed, designed, tested or distributed that certain video game made for operation the Nintendo Entertainment System ("NES"), but whose name is currently unknown to the Plaintiff, but who will be seasonably substituted when their correct identity is learned. All references herein to "Defendant, Defendants, or Defendant NOA" shall include all fictitious Defendants as well.

7. On or about January 29, 2005, the minor Plaintiff, Joshua Mancil, was at home playing the video game "Zelda II: The Adventure of Link," on his Nintendo NES game system. The game consists of a software cartridge that is intended by the manufacturer/designer, in the present case Defendant NOA, to be operated only by the use of a hardware console identified as an NES system, which is also manufactured distributed and sold by Defendant NOA.

8. Prior to January 2005, Defendant NOA (and/or fictitious Defendant A-F) did make, manufacture, design, market, sell and distribute or otherwise placed into the stream of commerce the videogame "Zelda II: The Adventure of Link," in the United States, generally, including within the state of Alabama.

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9. Upon information and belief, at the time Defendant NOA (and/or fictitious Defendant A-F) did make, manufacture, design, market, sell, distribute or otherwise placed into the stream of commerce the videogame "Zelda II: The Adventure of Link," when operated in conjunction with the required game hardware, had certain defects that would prove to cause serious personal injuries to the minor plaintiff herein.

COUNT I

Plaintiffs repeat and re-allege the allegations set forth in the paragraphs 1 through 8 of this Complaint as if fully set forth herein.

9. Upon information and belief, the aforesaid "Zelda II: The Adventure of Link,"video game was designed, manufactured, sold, distributed, and otherwise placed into the stream of commerce by Defendant NOA (and/or ficticious Defendant A-F).

10. Upon information and belief, Defendant NOA (and/or ficticious Defendant A-F) in the design, manufacture, selling, testing, quality control, post-production testing, and distribution were negligent, careless and reckless with regard to the design and manufacture of the aforesaid video game, in that the game was negligently and carelessly designed so as to be dangerous when used in the manner intended or reasonably and ordinarily foreseeable.

11. Upon information and belief, Defendant's (including Fictitious Defendants A-F) negligent, careless and reckless with regard to said design and manufacture, in that Defendant (including Fictitious Defendants A-F) failed to ensure that the video game was programmed, designed, and engineered in accordance with good and accepted

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practices; failed to warn the minor plaintiff of the defective nature of the design, programming, engineering and manufacturing of the video game; failed to warn the minor plaintiff of dangers which were latent dangers and not visible to the minor or his parent plaintiff and others; and said Defendant (including Fictitious Defendants A-F) was otherwise negligent, careless and reckless with regard to the design, manufacture, sales, distribution, testing, quality control, and post-production testing; and said Defendant (including Fictitious Defendants A-F)was otherwise negligent.

12. As a direct and proximate result of the negligence, carelessness and recklessness of the defendants, the minor plaintiff, while playing the video game identified above was seriously injured when he experienced a seizure while playing the video game. Plaintiff will likewise incur future expense and care as a direct and proximate result of Defendant's (including Fictitious Defendants A-F) negligent and reckless actions.

13. As a direct and proximate result of the negligence, carelessness and recklessness of the Defendant (including Fictitious Defendants A-F) , the minor plaintiff has been caused to sustain severe injury, has suffered pain, suffering, mental anguish and distress and loss, and has otherwise been caused to incur medical bills, and will cause him to incur future medical bills, and other losses.

14. At the aforesaid time and place of the seizure, the minor plaintiff was free from contributory negligence which could have caused or contributed to the aforesaid seizure.

15. As a direct and proximate result of the negligence, carelessness and recklessness of the Defendant (including Fictitious Defendants A-F) , the Plaintiff seeks

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judgment against the Defendants (including Fictitious Defendants A-F) in an amount to be deemed fair and reasonable by a jury, plus costs and such other relief as the court deems just and proper.

COUNT II

16. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 though 16 of this Complaint as though fully set forth at length herein.

17. Prior to January 2005, Defendant NOA (including Fictitious Defendants A-F)did make certain express and implied warranties, including the warranty of fitness for particular purpose and the warranty of merchantability, to the Plaintiffs, and the public generally, with regard to the use and operation of the aforesaid video game raising an expectation on behalf of the Plaintiffs herein and others as to the way the video game would function under normal circumstances.

18. Defendant (including Fictitious Defendants A-F) knew or reasonably should have known that the consuming public would rely upon its representations and warranties (expressed and implied); Plaintiff herein relied upon Defendant (including Fictitious Defendants A-F)to sell, market, or otherwise provide a product of merchantable quality, safe and fit for its intended purpose

19. Defendant NOA (including Fictitious Defendants A-F) breached its express and implied warranties, as it was not of merchantable quality or safe and fit for its intended purpose, and otherwise caused the video game to perform in a way that did not meet its warranties or the expectation of the plaintiff, and thereby caused injury to the infant plaintiff.

20. As a direct and proximate result of its breach of the aforementioned warranties, Defendants NOA (including Fictitious Defendants A-F), and without any negligence of the Plaintiff contributing thereto, the minor Plaintiff has been caused to sustain severe injury, has suffered pain, suffering, mental anguish and distress, emotional distress and loss, and has otherwise been caused to incur medical bills, and will cause him to incur future medical bills, and other losses.

21. At the time and place of the seizure described herein, the Plaintiff was free from contributory negligence which caused or contributed to the aforesaid seizure.

22. As a direct and proximate result of the breach of Defendant's (including Fictitious Defendants A-F)express and implied warranties, the Plaintiff seeks judgment against the Defendant (including Fictitious Defendants A-F) in an amount to be deemed fair and reasonable by a jury, plus costs and such other relief as the court deems just and proper.

COUNT III

23. Plaintiff repeats and re-alleges the allegation set forth in paragraphs 1 through 23 of this complaint as though fully set forth at length herein.

24. Defendant's (including Fictitious Defendants A-F) aforesaid video game was defective and unreasonably dangerous, not fit for the purpose intended or reasonably foreseeable, not reasonably safe and was otherwise defective when used in their ordinary and customary fashion, rendering Defendant (including Fictitious Defendants A-F) liable under the Alabama Extended Manufacturers' Liability Doctrine.

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25. As a direct and proximate result of defects in design, programming, engineering, warnings and manufacturing, the minor plaintiff has been caused to sustain severe injury.

26. The defective and unreasonably dangerous nature of Defendant's (including Fictitious Defendants A-F) video game was a proximate contributing cause to the injury sustained by the minor Plaintiff.

27. As a direct and proximate result of the defective and unreasonably dangerous nature of Defendant's (including Fictitious Defendants A-F) video game – "Zelda II: The Adventure of Link" -- the minor plaintiff has sustained severe injury,has suffered pain, suffering, mental anguish and distress, emotional distress and loss, and has otherwise been caused to incur medical bills, and will cause him to incur future medical bills, and other losses.

28. At the time and place of the seizure suffered, the plaintiff was free from any contributory negligence which caused or contributed to the aforesaid seizure.

29. As a direct and proximate result of the defective and unreasonably dangerous condition of Defendant's (including Fictitious Defendants A-F) product, the Plaintiff seeks judgment against Defendant NOA in an amount to be deemed fair and reasonable by a jury, plus costs and such other relief as the court deems just and proper.

COUNT IV

30. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 30 of this complaint as though fully set forth at length herein.

31. Defendant NOA (including Fictitious Defendants A-F) failed to warn the plaintiffs of the risks necessarily inherent with regard to the use of the product, and

otherwise failed to warn the Plaintiff(s) of the dangers involved with regard to the way the product was designed, programmed, engineered and manufactured.

32. As a result of the Defendants' (including Fictitious Defendants A-F) failure to warn of such defects, and of such dangers that were latent within the product, the minor plaintiff has been caused to sustain severe injury, emotional distress and loss, and has otherwise been caused to incur medical bills, and will otherwise be afflicted with severe permanent disabling injuries now and forever into the future that will affect him in all activities of daily living, and will forever cause him to have to incur medical bills, and will cause him to incur future medical bills, and other losses.

33. At the time and place of the seizure suffered, the plaintiff was free from any contributory negligence which caused or contributed to the aforesaid seizure.

34. As a direct and proximate result of the defective and unreasonably dangerous condition of Defendant's (including Fictitious Defendants A-F) product, and its failure to warn Plaintiffs of the latent defects inherent in its product, Plaintiffs seek judgment against Defendant NOA (and/or ficticious Defendant A-F) in an amount to be deemed fair and reasonable by a jury, plus costs and such other relief as the court deems just and proper.

COUNT V

35. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 35 of this complaint as though fully set forth at length herein.

36. Defendant NOA (and/or ficticious Defendant A-F) did manufacture, design, program, engineer, test (or fail to properly test), distribute, sell, and otherwise place into the stream of commerce the video game "Zelda II: The Adventure of Link."

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37. Upon information and belief, these parts included, but without limitation, the software which produced the imagery of the game, flash, luminance, brilliance, and the repetitive nature of color flashes.

38. Upon information and belief, the imagery, flash, luminance, brilliance and repetitive nature of the video game as designed and manufactured by Defendant NOA (and/or ficticious Defendant A-F) were negligently, carelessly and recklessly designed and manufactured, and were made in such a way that would allow the imagery to cause photosensitive epileptic-type seizures in some people playing the video game.

39. Defendant NOA (and/or ficticious Defendant A-F) was at all pertinent times negligent, careless and reckless in its overall plan of the imagery of the video games in that it failed to adequately design, engineer, program, and/or otherwise manufacture the aforesaid video game so they could be adequately watched and played during normal use without inducing seizures. Defendant NOA (and/or ficticious Defendant A-F) also failed to warn the Plaintiffs of the defective nature of the design and manufacture of the video game; failed to warn the Plaintiff of dangers which were latent and not visible to the Plaintiffs and others; and Defendant NOA (and/or ficticious Defendant A-F) was otherwise negligent, careless and reckless with regard to the design, manufacture, sales, distribution, testing, quality control, and post-production testing; and defendants were otherwise negligent.

40. Defendant NOA (and/or ficticious Defendant A-F) had within its knowledge information from which it could reasonably predict that colors and flash patterns could or would induce seizures in some individuals, but failed to adequately warn consumers, including plaintiff.

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41. As a direct and proximate result of the negligence, carelessness and recklessness of Defendant NOA (and/or ficticious Defendant A-F) , and of the defects in Defendant's product as discussed herein, Plaintiff suffered a serious and violent seizure.

42. Despite having knowledge of the aforesaid defects in design, programming, engineering and manufacture of the aforesaid video games, Defendant NOA (and/or ficticious Defendant A-F) willfully, wantonly, and deliberately defectively designed, manufactured, marketed and distributed said video games with the aforesaid defective conditions, evidencing a conscious indifference to the consequences of its actions..

43. As a result of Defendant NOA (and/or ficticious Defendant A-F)'s conscious, willful, wanton and deliberately indifferent conduct, Plaintiffs seek punitive damages against Defendant

WHEREFORE, Plaintiffs hereby demands judgment against the defendants, in such fair and reasonable amount as may be awarded by a jury of their peers, together with such other and further relief as to the Court may deem just and proper, including costs and disbursements of this action.

Dated: January 29, 2007

Respectfully Submitted,

SimmonsCooper LLC

BY: ______________________
David F. Miceli (MIC006)
Attorney for Plaintiff

OF COUNSEL:
SimmonsCooper LLC
119 Maple Street
Suite 201
Carrollton, Georgia 30117
770/834-2122
770/214-2622 facsimile

JURY TRIAL DEMANDED

Plaintiffs hereby DEMAND a trial by jury on all issues in this case.

David F. Miceli (MIC006)
Attorney for Plaintiff

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- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Nintendo of America Inc
4820 150th Avenue NE
Remond, WA 98052

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BILLY YATES
CLERK, CIRC[...]

COMPLETE THIS SE[CTION ON] DELIVERY

A. Signature
X Valerie McGraw ☒ Agent ☐ Addressee

B. Received by (Printed Name) VMcGraw

C. Date of Delivery 4-6

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

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3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number
(Transfer from service la[bel]) 7006 3450 0001 5541 6829

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

CERTIFIED MAIL RECEIPT

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Certified Fee	
Return Receipt Fee (Endorsement Required)	
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Total Postage & Fees	$

4/9/07

Postmark Here

Sent To: Nintendo of America Inc

Street, Apt. No.; or PO Box No.: 4820 150th Avenue NE

City, State, ZIP+4: Redmond, WA 98052

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